91-934

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAFAEL SANTIAGO,

Petitioner,

vs.

NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MICHAEL H. SUSSMAN
1 HARRIMAN SQUARE
GOSHEN, NEW YORK 10924
(914)-294-3991

DECEMBER 9, 1991

QUESTIONS PRESENTED

1. WHETHER THE FOURTEENTH AMENDMENT AUTHORIZES INDIVIDUALS TO SUE DIRECTLY AGAINST STATES WHICH HAVE VIOLATED THEIR CONSTITUTIONAL RIGHTS?

2. WHETHER THE FOURTEENTH AMENDMENT WORKED BY ITS VERY TERMS AN ABROGATION OF THE ELEVENTH AMENDMENT?

3. WHETHER BY ENACTING THE FOURTEENTH AMENDMENT THE STATES WAIVED ANY CLAIM OF SOVEREIGN IMMUNITY THEY MIGHT OTHERWISE HAVE HAD?

4. WHETHER PETITIONER SHOULD HAVE BEEN REQUIRED TO NAME INDIVIDUAL AGENTS OF THE STATE, RATHER THAN THE STATE ITSELF, IN A SUIT PREDICATED ON A STATE POLICY AND PRACTICE DENYING HIS RIGHTS ON THE BASIS OF HIS ETHNICITY OR LOSE HIS RIGHT TO OBTAIN INJUNCTIVE RELIEF?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Rafael Santiago, respectfully requests that the Court issue a writ of certiorari to review the

judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (1a-16a) is reported at 945 F.2d. 25 (2d Cir. 1991). [Accompanying this Petition is an Appendix with both opinions below.] The opinion of the district court (17a-38a) is reported at 725 F.Supp. 780 (S.D.N.Y. 1990) and the district court's denial of respondent's motion to reargue appears at 734 F.Supp. 653 (S.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1991. This court has jurisdiction pursuant to 28 U.S.C. sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution states:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment to the Constitution states in relevant section:

"Section 1: ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 5. The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article."

STATEMENT OF THE CASE

INTRODUCTION

Petitioner, Rafael Santiago (hereinafter "Santiago" or petitioner) works as a Corrections Officer for the State of New York. In the summer of 1987, the New York State Department of Correctional Services (hereinafter "DOCS" or respondent) deemed him mentally unfit to discharge his duties. After a state-mandated due process hearing, DOCS discharged Santiago from employment. Thereafter, on his appeal, the New York State Civil Service Commission ordered DOCS to retroactively reinstate Santiago with back pay and benefits. The Commission lacked the authority to and did not award Santiago either the attorney's fees and costs arising from these

proceedings or compensatory damages arising from the pain, suffering, humiliation and mental anguish occasioned by DOCS' "mental fitness" discharge.

Petitioner then initiated this action in the district court alleging that DOCS had characterized him mentally unfit as part of a state policy and practice which so labeled a disproportionate number of minority employees in a discriminatory manner in violation of Section 1 of the Fourteenth Amendment.

Petitioner also sued Dr. Melvin Steinhart, a consulting psychiatrist employed by DOCS on a per case basis, claiming that he had intentionally and maliciously falsified psychiatric reports in furtherance of the state's racially discriminatory policy and practice.

DOCS, a state agency, moved to dismiss Santiago's complaint contending

that the Eleventh Amendment barred a judgment awarding money damages against the State or any of its instrumentalities.

The district court denied this motion, holding that the Fourteenth Amendment was passed after the Eleventh Amendment and worked an abrogation of that Amendment. The district court also held that, by ratifying the Fourteenth Amendment, the states had consented to suit notwithstanding the Eleventh Amendment.

DOCS appealed to the Second Circuit which reversed, holding that the Eleventh Amendment worked an absolute bar to this suit which sought money relief directly against a state agency.

As petitioner believes that the Second Circuit has too parsimoniously interpreted Section 1 of the Fourteenth Amendment and elevated form over

substance, he requests that this court grant this petition and review the merits of this "novel" dispute.

BASIS FOR FEDERAL JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. secs. 1343 (3) and (4).

STATEMENT OF FACTS

As recited by the Court of Appeals, the relevant facts are as follows:

On June 15, 1987, Santiago, an Hispanic corrections officer employed by DOCS, was suspended from work after an altercation with a supervisor. Following this incident, which was the culmination of several months of harassment by his supervisors, Santiago requested and received a leave of absence from the facility. During this leave, Santiago was treated for stress-related disorder by a private psychotherapist. In late June,

Santiago's psychologist informed DOCS that the officer would be fit to return to work on July 15, 1987. DOCS refused to permit Santiago to return to work and sent him to state facilities for psychological testing.

Through its consultants and staff, DOCS determined that petitioner was unfit to resume his duties and on August 13, 1987, DOCS placed petitioner on involuntary leave of absence. Santiago immediately requested the due process hearing to which state law entitled him. DOCS then scheduled another interview between petitioner and its lead consulting psychiatrist, Dr. Melvin Steinhart. On September 15, 1987, this interview occurred in Albany.

Based on this examination, Steinhart prepared a "materially false and misleading report" confirming his prior

opinion that Santiago was unfit to resume his duties. DOCS relied on this report at the subsequent hearing.

Through expert testimony of his own, Santiago challenged this conclusion at the due process hearing. The hearing officer agreed with DOCS and recommended that Santiago be involuntarily terminated based upon his mental incapacity. DOCS, in turn, adopted the hearing officer's conclusion and so notified Santiago.

Petitioner then appealed to the State Civil Service Commission which reversed the agency's determination of unfitness, ordered him reinstated and granted him back pay through July 15, 1987, the day his psychologist deemed petitioner fit to resume his duties. The Commission entered no other relief in petitioner's favor. (4a).

Santiago then commenced this suit in United States District Court claiming that DOCS and Steinhart had violated several provisions of federal law, including Section 1 of the Fourteenth Amendment by adopting and implementing a "systematic and intentional practice of disciplining Black and Hispanic corrections officers in a discriminatory fashion". Santiago sought damages for emotional distress and reimbursement of his litigation costs from DOCS and punitive damages against Dr. Steinhart. Santiago also sought injunctive relief against retaliation by DOCS for his bringing this suit.

DECISIONS BELOW

DECISION OF THE DISTRICT COURT

The district court denied DOCS' motion to dismiss the Fourteenth Amendment count.

It first noted that this Court and the Second Circuit had reserved decision on the issue of whether the Eleventh Amendment immunizes a state agency against damage actions brought directly under the equal protection clause of Section 1 of the Fourteenth Amendment. Edelman v. Jordan, 415 U.S. 651, 694,n.2 (1974)(Marshall, J. dissenting) and Holley v. Lavine, 605 F.2d 638, 648 (2d Cir. 1979).

The district court next observed that only since Hans v. Louisiana, 134 U.S. 1, 10 (1890) has this Court interpreted the Eleventh Amendment as rendering states and their agencies immune from damage suits in federal court by their own citizens. Thus, at the time the Fourteenth Amendment was enacted in 1868, such immunity was not the law of the land.

Since Hans, two exceptions have developed to application of the doctrine of sovereign immunity. The first obtains where Congress intends to hold states liable for damages. See, Pennsylvania v. Union Gas Co., 109 S.Ct. 2273, 2281 (1989). The second applies where a state consents to such a suit. Clark v. Barnard, 108 U.S. 436 (1983). Evidence of this consent may be "constructive", though it must be strong. Edelman v. Jordan, 415 U.S. 651, 673 and Petty v. Tennessee Missouri Bridge Commission, 359 U.S. 275 (1959).

The district court next found that "there is no rational reason why the `law of the land' cannot just as readily satisfy the conditions for an exception [to the Eleventh Amendment] as a statute."

The Fourteenth Amendment, the district court next observed, explicitly

restricts the states. Fitzpatrick v. Bitzer, 427 U.S.445, 453 (1976). Moreover, precedent recognizes the self-effecting nature of this provision. See, The Civil Rights Cases, 109 U.S. 3, 20 (1883)("the Fourteenth Amendment is undoubtedly self-executing without any ancillary legislation".)

Many civil rights cases, including Brown v. Board of Education, 347 U.S. 483 (1954); Milliken v. Bradley, 433 U.S. 267 (1977); University of California v. Bakke, 438 U.S. 256, 289 (1978) and Plyer v. Doe, 457 U.S. 202 (1982) arose **directly** under the equal protection clause, with plaintiffs relying on no other substantive source of legal rights against the alleged abuse of state power. Powers v. Ohio, 111 S.Ct. 1364 (1991) (holding that equal protection clause prohibits a prosecutor from using the state's peremptory

challenges to exclude otherwise qualified and unbiased persons from the petit jury solely on the basis of their race.).

In Milliken, supra., this Court upheld a significant monetary award against the State of Michigan. This award arose from the district court's judgment that compensatory educational services were required to undo the effects of school segregation. In challenging the district court's authority under the Tenth Amendment, Michigan suggested that the Fourteenth Amendment could not be used in a manner which interfered with the "integrity of the structure and functions of state and local government." This Court upheld the district court's order, finding it to be a proper effectuation of remedial principles and, in so doing, implicitly recognized the self-executing

character of Section 1, upon which the judgment was premised.

The district court read Milliken, supra., as a clear signal that Section 1 of the Fourteenth Amendment had vitality independent from Congressional enactments under Section 5. Absent the need for such enforcing legislation, Section 1 vests courts with jurisdiction directly, even absent legislation abrogating the doctrine of sovereign immunity.

The district court next addressed the issue of whether Section 1 of the Fourteenth Amendment permits the award of retroactive monetary relief. In addressing this issue affirmatively, the district court first noted that Santiago had no cause of action against the State under 42 U.S.C. sec. 1983 or under 42 U.S.C. sec. 2000e, et seq. for the relief sought. Thus, the court recognized

properly that "[P]laintiff brings this action under the Constitution to obtain compensation for his expenses and emotional suffering allegedly caused by DOCS' invidious discrimination." (33a).

The district court found that DOCS had failed to cite "statutory language or clear legislative history" providing that a constitutional cause of action against a state agency for expenses and emotional injury cannot complement the statutory schemes for recovery. Cf. Bush v. Lucas, 462 U.S. 367, 378 (1983). (33a-34a, n.8). Indeed, according to the district court, "[I]t would be contrary to the intention of the Fourteenth Amendment to defer to incomplete statutory remedies for violations of equal protection by a state."

In the absence of a statutory remedy against the State, the district

court found precedent for petitioner's action in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971). Moreover, as Bivens, supra., itself recognized the availability of compensatory damages to remedy constitutional violations, the district court perceived no basis for limiting damages against a state in circumstances like these to back pay. As it explained, "DOCS has provided no reason why emotional damages should be available for due process and Fourth Amendment violations, but not equal protection deprivations... The court finds an award for emotional damages and out-of-pocket expenses to be appropriate for the alleged deprivation of equal protection by a state agency's intentional racial discrimination." (37a). On these bases, the district court denied respondent's motion to dismiss.

OPINION OF THE COURT OF APPEALS

The Court of Appeals for the Second Circuit reversed. (1a-16a). The Court of Appeals' opinion rests on the following reasoning:

(a) this Court has disallowed suits against the states under the Fourteenth Amendment except where Congress has clearly abrogated the Eleventh Amendment or the states have consented to such suit.

(b) specifically, according to the Second Circuit, this Court has affirmed judgments requiring states to expend funds in suits brought directly under Sec. 1 of the Fourteenth Amendment, i.e., Milliken, supra., only under the guise of prospective relief. (9a).

(c) addressing the district court's holdings that the Eleventh Amendment does not bar this suit because the Fourteenth Amendment abrogated it and because the

states consented to suit by ratifying it, the Court of Appeals noted that both doctrines are applied only when evidence of congressional or state intent is unmistakably clear. (10a). Section 1 of the Fourteenth Amendment fails this standard and this Court has never held to the contrary. Only where Congress has acted under Section 5 has this Court allowed abrogation of sovereign immunity. (12a). Nor, in light of the language of section 1, did the Court of Appeals find that the states unequivocally expressed their consent to suit. Thus, the Eleventh Amendment barred Santiago's right to seek money damages for injuries allegedly inflicted pursuant to discriminatory state policy and practices.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

"The Fourteenth Amendment is directed to the states. It marked an extension of federal authority, a move toward uniformity throughout the nation in matters of civil liberties, to be attained by the authority of the federal government." A. Bickel, **The Least Dangerous Branch**, Bobbs-Merrill, 7th Printing, 1975, p. 101.

The reasoning of the Court of Appeals conflicts with the logic of this Court's decision in Will v. Michigan, 109 S.Ct. 2304 (1989). There, Justice White held that 42 U.S.C. section 1983 does not countenance suit in state court against a state because the clear reading of section 1983 informs that a state is not a person.

Likewise, a clear reading of Section 1 of the Fourteenth Amendment commands the conclusion that, by its terms, Congress intended to insure that

states and their agencies comply with substantive federal law in their treatment of persons. Gregory v. Ashcroft, 111 S.Ct. 2395, 2405 (1991) (provisions of the Fourteenth Amendment "were specifically designed as an expansion of federal power and an intrusion on state sovereignty", citing City of Rome v. United States, 446 U.S. 156, 179 (1986)); See, Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

Likewise, the Second Circuit's opinion misreads the equally clear language of Section 5 of the Fourteenth Amendment. While that provision undoubtedly gives Congress authority to pass laws forwarding the purposes of Section 1, the clear language gives no hint that this was to be the only way to implement Section 1. The judiciary exists as a co-equal branch of government in

large measure to enforce the equal protection and due process guarantees absent Congressional enactment. Indeed, Brown v. Board of Education, supra., the shining moment of the modern judiciary, represents precisely such an application.

And, if the judiciary can require states and their creatures, i.e., local school districts, to re-organize entire modes of operation, expending millions of dollars - all under the authority of Section 1 of the Fourteenth Amendment, Milliken, supra., without implementing Congressional legislation - then how can that same judiciary be without the less intrusive authority to ensure that **individual** citizens find relief from the intentionally discriminatory state practices visited upon them?

As in other Section 1 cases, the scope of the relief requested here is

precisely tailored to the nature and effect of the underlying violations. Milliken v. Bradley, supra. at 283. As such, remedy should be available on behalf of individuals, like Santiago, as well as to classes of persons disadvantaged by prior state action.

Finally, our courts have used the authority Section 1 provides to enforce equal rights not only without Congressional authorization pursuant to Section 5. They have done so against the popular grain of thinking, against Congressional intent, not merely in the absence of Congressional authorization.

1. **In its logic, the decision below conflicts with recent precedent of this court and the clear purposes of the Fourteenth Amendment.**

In Will v. Michigan Dep't. of State

Police, 109 S. Ct. 2304 (1989), the Court extended its prior holding in Quern v. Jordan, 440 U.S. 332 (1979) that the Eleventh Amendment barred federal court actions against states pursuant to 42 U.S.C. sec. 1983. However, in Will, which barred suit in state court against states under 42 U.S.C. sec. 1983, the majority relied heavily on the plain meaning of section 1983 in concluding that states were not among its intended targets. To the question presented: "whether the word "persons" in this statute includes the States and state officials acting in their official capacities", the Court answered in the negative because common usage does not include the sovereign within the term "person". Id. at 2308.

Applying similar plain usage, it is clear that section 1 of the Fourteenth Amendment prevents states from infringing

upon certain enumerated individual rights, i.e., to due process and equal protection. Nothing in the language of the constitutional amendment suggests any hedge or equivocation by Congress about either the subject of this prohibition or its range.

Like the Commerce Clause, the Fourteenth Amendment "does more than confer power on the federal government". It also is "a self-effecting limitation on the power of the states...". Dennis v. Higgins, 111 S.Ct. 865, 870 (1991), violations of which must be cured in a tailored manner.

Put another way, "the plan of the committee", as manifest by the plain language of the drafters of the Amendment, demonstrates the intent to abrogate any sovereign immunity that they may have supposed applied on behalf of states and

against their own citizens. Blatchford v. Native Village of Noatak, 111 S.Ct. 2578, 2581 (1991).

Moreover, as this court recognized last term, when dealing with a statute or an amendment adopted in the middle of the nineteenth century, it is illogical to apply the "unmistakably clear language" rule to decide whether Congress intended to abrogate sovereign immunity. Blatchford, supra., at 2585.

Nor, contrary to the opinion below, could states have adopted the Fourteenth Amendment in the hope that it would leave undisturbed their relationships with the federal government. For, clearly, this amendment worked a major and intended shift in power from the states to federal authorities, including federal courts.

Indeed, a central purpose of the amendment was to better secure individual

rights against state authority, an initial intention of the framers' commitment to a federal system in the first instance. Gregory v. Ashcroft, supra, at 2399. Moreover, Section 1's self-executing character, when combined with the states' knowledge that federal courts existed, in large part, to vindicate the individual rights granted, could have lead enacting states to but one conclusion: that any immunity they might have claimed in suits alleging violations of due process or equal protection rights would be scoffed at, not respected once they ratified the Fourteenth Amendment.

How, to put the matter yet another way, could states so elevate individual rights against their own potential abuses and simultaneously assume that the victims of their violations would be without remedy?

The plain language of Section 5 reinforces the self-executing nature of Section 1 and the undeniable conclusion that provision authorized our courts to act as the protectors of the granted rights. See, Dennis v. Higgins, supra., at 870(interpreting the phrase "Congress shall have power...[t]o regulate commerce..." as self-executing and not dependent, for force and effect, upon actual congressional action). Section 5 states: "Congress shall have power...". The provision does not state, "Congress shall have **the power...**"

Had the framers of the Amendment or the States intended to limit the enforcing role of the judiciary, the grant of power to Congress would have been exclusive, a meaning impossible to discern from Section 5's plain language, or the grand intent of the Amendment. Primate Protection League

v. Tulane Education Fund, 111 S.Ct. 1700, 1704 (1991)("we continue to recognize that context is important in the quest for [a] word's meaning." United States v. Bishop, 412 U.S. 346, 356..."; K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("Court must look to the particular language at issue, as well as the language and design of the statute as a whole.").

Moreover, in determining whether the states consented to the abrogation of their own sovereign immunity, assuming any existed to begin with, this Court should assign considerable importance to the distinction between a constitutional amendment and a statute.

In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), dissenting from the overruling of National League of Cities v. Usury, 426 U.S. 833 (1976), Chief Justice Burger

recognized that a later ratified constitutional amendment may overcome the effect of a former amendment. At the same time, the majority in Garcia demonstrated how the structure of our government amply protects the states against legislative intrusion into their sovereignty. In Usury, elevating the interests of state rights and seeking to insulate from federal regulation those "matters that are indisputable attributes of state sovereignty," Garcia, supra. at 537, the Court prohibited such regulation of "traditional state functions". Like the doctrine of Eleventh Amendment immunity, Usury was premised on the unique role of the states in our federal system and the need to protect them from federal intrusion.

But in Garcia, this Court held that Usury represented a form of over-

protectiveness neither contemplated by our constitutional scheme nor required by the states as a brake against federal power. The Court recognized that States have other forms of "procedural" protections which amply assure that federal regulators will not trammel their legitimate interests.

The same principle applies here and properly caused the district court to reject DOCS' contention that the Eleventh Amendment limits the clear protections envisioned by the Fourteenth. The ratification process, even more so than the states' indirect participation in the legislative process, represents precisely such procedural protection. Cf., Gregory v. Ashcroft, supra. at 2401 (recognizing that the absence of states' participation in the federal legislative process is the root of the Court's declaration that a

Congressional purpose be unmistakably clear before permitting federal regulations to expand into an area of traditional state concern).

And, by their ratification, state legislatures themselves assented to the fundamental obligations created by Section 1. Just last term, this Court recognized the difference between a constitutional amendment and a statutory enactment. In the former instance, the Court must consider the product to reflect the assent of not only the governing body, but also the governed. "In this case, we are dealing not merely with governmental action, but with a state constitutional provision approved by the people of Missouri, as a whole. This Constitutional provision reflects both the considered judgment of the state legislature that proposed it and the citizens of Missouri

who voted for it." Gregory v. Ashcroft, supra. at 2406. Likewise, here, ratification of Section 1 by the states represented not merely its assent to its dictates, but a desire to bind each state in furtherance of the enumerated individual rights created. The Second Circuit gave short shrift to the force of this ratification and, to the rights thereby created against the states.

Indeed, the opinion not only degrades the role of the federal judiciary; it also tends to negate the intent of Congress and the ratifying states which sought to extend meaningful protection of individual rights.

2. **The opinion below elevates the interests of states over the interests of individuals in an unwarranted manner at the same time it subordinates the role of the federal courts.**

The decision below admittedly has

left petitioner with no remedy for the deprivation of his right to equal protection. Assuming the allegations of his Complaint are true, the State of New York has a policy and practice of more harshly disciplining minority corrections officers than whites; petitioner fell victim to that policy, but cannot gain redress for the denial of his right to equal protection of the laws.

Correlatively, the opinion below limits the efficacy of our federal court system: federal courts are unable to provide victims of racial discrimination with "make whole" relief.

The court below justified this outcome by reference to the alleged need to protect state fiscs from awards of damages to victims of intentional racial discrimination.

Petitioner submits that the opinion below mis-prioritized our constitutional values. In the absence of a "textually demonstrable commitment of [an] issue to a coordinate [political] branch," Baker v. Carr, 369 U.S. 186 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to be merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce those rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." Davis v. Passman, 442 U.S. 228, 242 (1979).

It is for this reason - to allow the vindication of fundamental rights -

that this Court upheld the authority of federal courts to create a constitutional common law in Bivens, supra.

Nor does the logic of Edelman v. Jordan, supra. and Milliken v. Bradley, supra., square with economic realities or offer a sound or logical decision rule. If a state may pay for remedying the vestiges of discriminatory educational practices, why should it not be required, upon a like showing of racial discrimination, to pay for the reconstruction of a victim's life. Certainly in both instances, the required payments will have, it is hoped, a curative effect - on the one hand, in affording better educational opportunities to the victims of discrimination and, on the other, in helping an individual victim of pernicious race-based discrimination

repair the damage to his identity and life.

The opinion below seeks to distinguish "damages", which it claims are prohibited, from the "public expense" of remedial programs aimed at remedying "past discrimination" in public education. While the latter relief is broader in application and effect, its source - a violation of the constitution - and its purpose - to remedy that violation through money - are the same as here. Semantics should not be used to ennoble one form of relief and proscribe the next.

CONCLUSION

FOR THESE REASONS, THE COURT SHOULD ISSUE THE REQUESTED WRIT AND REVERSE THE DECISION OF THE COURT OF APPEALS.

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91-954

No.

In The

Supreme Court of the United States

October Term, 1991

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vs.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 10, 1991

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 842 — August Term 1990

(Argued February 13, 1991) Decided September 10, 1991

Docket No. 90-7020

RAFAEL SANTIAGO,

Plaintiff-Appellee,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and DR. MELVIN J. STEINHART,

Defendants.

NEW YORK STATE DEPARTMENT CORRECTIONAL SERVICES,

Defendant-Appellant.

BEFORE: PIERCE, WINTER and WALKER, *Circuit Judges*

Appeal from an order of the United States District Court for the Southern District of New York (Robert J. Patterson, *Judge)* denying New York State's Department of Correctional Services' motion to dismiss plaintiff-appellee's claim for damages and injunctive relief against the Department of Correctional Services brought under Section 1 of the Fourteenth Amendment.

Reversed with instructions to dismiss the complaint against DOCS.

LAWRENCE S. KAHN, Deputy
Solicitor General New York, NY
(Robert Abrams Attorney General

Appendix A

of the State of New York, Howard L. Zwickel, Ellen J. Fried, Marilyn T. Tratfield, of counsel) *for Defendant-Appellant*

MICHAEL H. SUSSMAN, Goshen, NY, *for Plaintiff-Appellee*

WALKER, *Circuit Judge:*

This case presents the novel issue of whether an action for damages based on a state's past deprivations of Fourteenth Amendment guarantees may be brought directly against a state under Section 1 of the Fourteenth Amendment, despite the traditional bar of Eleventh Amendment state immunity. Although a statutory civil rights damage action against a state alleging past Fourteenth Amendment deprivations is barred by the Eleventh Amendment, the question arises whether an action may nonetheless proceed directly under Section 1 of the Fourteenth Amendment since the Fourteenth Amendment was adopted subsequent to the Eleventh and imposes affirmative due process and equal protection obligations of the states through Section 1's self-executing substantive provisions.

The case comes to us as an appeal from an opinion and order of the United States District Court for the Southern District of New York (Robert J. Patterson, *Judge*) denying a motion by the New York State Department of Correctional Services (DOCS) to dismiss plaintiff-appellee Rafael Santiago's suit against it brought under Section 1 of the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983 and 1985(3) for emotional damages, litigation costs, and an injunction. Because we agree with DOCS that an action

directly under Section 1 of the Fourteenth Amendment is barred by the Eleventh Amendment because it does not fit under either the "clear statement" or "waiver" exceptions to states' immunity from retroactive damage suits against them in federal court, we reverse Judge Patterson's denial of DOCS' motion to dismiss on jurisdictional grounds. We also hold that Judge Patterson should have dismissed Santiago's claim for prospective relief due to his failure to abide by the *Ex Parte Young* fiction in suing DOCS directly, instead of an officer of DOCS.

Reversed, and complaint dismissed.

BACKGROUND

On June 15, 1987, Plaintiff-Appellee Rafael Santiago, a Hispanic corrections officer employed at the Otisville Correctional Facility in Orange County, New York, had an altercation with his supervisor. Following this incident, Santiago requested a leave of absence from the facility, which he received. During his leave, Santiago sought treatment from a privately retained psychologist. In late June, this psychologist sent a letter to the New York State Department of Correctional Services (DOCS) opining that Santiago would be able to resume work by July 15. However, DOCS refused to allow Santiago to return to work until he had been examined by a state Employee Health Service (EHS) physician, in order to determine whether he could return to work without jeopardizing the health or safety of other employees. The EHS physician, Dr. John Hargraves, examined Santiago on July 6, and then referred him to defendant Dr. Melvin Steinhart, a psychiatrist, for an additional examination. Dr. Steinhart is not employed by EHS, but performs outside examinations of state employees at the request of the state.

Appendix A

Based on his own examination of Santiago, and an additional examination by Dr. Horenstein, an EHS consulting clinical psychologist, Dr. Steinhart recommended to DOCS that Santiago's medical leave be continued. On August 13, 1987, DOCS notified Santiago that he would be placed on involuntary leave of absence. Santiago protested this action to DOCS, requesting a hearing pursuant to N.Y. Civil Service Law § 72(1) to contest the determination. DOCS referred Santiago to Dr. Steinhart for an additional examination, which took place on September 15, 1987. Based on this examination, Dr. Steinhart prepared what Santiago terms a "materially misleading and false report" concluding that Santiago was mentally unfit to perform the duties of a corrections officer.

In October, 1987, Santiago's hearing pursuant to § 72(1) on his challenge to DOCS' involuntary leave decision was held. After several hearing days, the hearing officer found that Santiago was unable to perform the duties of a corrections officer due to a "medical disability." Pursuant to Civil Service Law § 72(3) Santiago appealed this determination to the Civil Service Commission, which after its hearing in April, 1988, reversed the hearing officer's decision, finding that as of July 15, 1987, Santiago had been fit for work as a corrections officer. The Commission ordered Santiago reinstated, and awarded him back pay and benefits for the time he had been on involuntary leave. The Commission did not, and was without authority to, award Santiago compensation for pain and suffering or for his litigation costs.

Santiago then commenced a suit in United States District Court for the Southern District of New York, claiming that DOCS and Dr. Steinhart had violated 42 U.S.C. §§ 1981, 1983, 1985(3), and Section 1 of the Fourteenth Amendment by conspiring to prepare a materially misleading report relied upon by DOCS in

finding plaintiff unfit for work. This action, Santiago claimed, was a part of DOCS' systemic and intentional practice of disciplining black and Hispanic corrections officers in a discriminatory fashion. Santiago sought damages for emotional distress and reimbursement of his litigation costs from DOCS, and punitive damages against Steinhart, as well as an injunction that would prohibit DOCS from taking any "retaliatory action" against him for bringing the lawsuit.

DOCS moved to dismiss the suit under Fed. R. Civ. P. 12(b)(1) and (6), arguing that the Eleventh Amendment to the United States Constitution barred the maintenance of this action under both the civil rights statutes and the Fourteenth Amendment for damages against a state or a state agency in federal court. In responding to DOCS' motion, Santiago conceded that his §§ 1981 and 1983 claims against DOCS were barred by the Supreme Court's decisions in *Patterson v. McClean Credit Union,* 491 U.S. 164 (1989) and *Will v. Michigan Dep't of State Police* 491 U.S. 58 (1989), respectively; however, Santiago maintained that he still had a cause of action against DOCS directly under Section 1 of the Fourteenth Amendment.

In a November 29, 1989 opinion, Judge Patterson denied DOCS' motion to dismiss, agreeing with Santiago that the Eleventh Amendment did not bar his suit under Section 1 of the Fourteenth Amendment. The Court dismissed the § 1985(3) claim because Santiago failed to satisfy that section's threshold requirement of a conspiracy between "two or more persons", it held that a suit under Section 1 of the Fourteenth Amendment fell under both the "clear statement" and "waiver" exceptions to Eleventh Amendment immunity. Congress had expressed its clear intention to hold states responsible for due process and equal protection violations without due process of law by passing the self-executing

substantive provisions of the Fourteenth Amendment embodied in Section 1, Judge Patterson reasoned, and the states had waived their immunity from citizens' suits protesting such deprivations by ratifying the Amendment. The court then addressed the 'separate' question of whether Section 1 permits a remedy for violations of its provisions encompassing a retroactive damage award. Holding that the need for a damage recovery beyond backpay or injunctive relief permits courts to fashion a remedy based on *Bivens v. Six Unknown Federal Agents,* 403 U.S. 388 (1971), for a constitutional violation not encompassed by other statutes, the court allowed Santiago's claim for emotional damages against DOCS to proceed.

DOCS appeals from Judge Patterson's decision.

DISCUSSION

A. Permissibility of a Suit for Retroactive Damages against States under Section 1 of the Fourteenth Amendment

The question squarely before us in this appeal is whether a person may bring a suit for retroactive damages against a state or a state agency[1] in federal court directly under Section 1 of

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1. Agencies of the state, such as DOCS, are entitled to assert the state's Eleventh Amendment immunity where, for practical purposes, the agency is the alter ego of the state and the state is the real party in interest. *See Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 100 (1984) ("in the absence of consent [claims against] the State or one of its agencies or departments . . . [are] proscribed by the Eleventh Amendment"); *see also Edelman v. Jordan,* 415 U.S. 651, 663 (1974) ("It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment . . . . 'When the action is in essence one for the recovery

(Cont'd)

the Fourteenth Amendment, despite the principle of state sovereign immunity embodied in the Eleventh Amendment. In answering it, we find Santiago's argument that "the Fourteenth Amendment, *ex proprio vigore* works a *pro tanto* repeal of the Eleventh Amendment" *Milliken v Bradley*, 433 U.S. 267, 290-91, n.23 (1977) (failing to reach the issue), to be too facile. An examination of Supreme Court Eleventh Amendment jurisprudence reveals a complex and flexible relationship between that Amendment and the Fourteenth, and leaves no room for the notion that the later amendment simply erased the earlier. Without denying the self-executing nature of the substantive provisions of the Fourteenth Amendment that impose substantial duties on the states, the Court has nevertheless recognized that states have enjoyed a historical immunity, embodied in the Eleventh Amendment, from suit in federal court "seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Therefore the Court has to this date only sanctioned actions for damages arising from a state's violation of the Fourteenth Amendment when Congress has acted under § 5 of the Amendment to "enforce" its sections with "appropriate legislation" which allows for such a federal remedy. In the absence of Congressional action under § 5, the Court has not recognized Fourteenth Amendment abrogation of the Eleventh Amendment, such as would permit an action for damages against a state in federal court. Therefore, in following and appreciating the delicate balance struck between the Amendments throughout Supreme Court jurisprudence on this issue, we conclude that we cannot

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(Cont'd)

of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nomimal defendants.' ") (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945)).

permit Santiago's action to proceed in federal court.

Upon first reading, the Eleventh Amendment does not recognize any compromise in the jurisdictional barrier it erects protecting states from suit in federal court. It merely states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court in *Hans v. Louisiana*, 134 U.S. 1 (1890), added to this unrestricted immunity by holding that suits by a state's own citizens in federal court are likewise barred by the Amendment.

However, in the landmark case of *Ex Parte Young*, 209 U.S. 123 (1908), the Court first recognized the tension existing between the grant of such absolute immunity to states in federal court and the charge put to them by the Fourteenth Amendment of the federal Constitution to afford equal protection and due process to their citizens. There the Court held that the Eleventh Amendment did not bar an action in federal court seeking to enjoin a state official from enforcing a statute claimed to violate the Fourteenth Amendment. *Ex Parte Young* changed the jurisdictional boundaries of the Eleventh Amendment, effectively reading out the words "or equity" in the Amendment in cases of constitutional violations by allowing federal courts to order prospective equitable relief when state officials failed to conform their conduct to the strictures of the substantive provisions of the Fourteenth Amendment. *See Edelman v. Jordan*, 415 U.S. at 664.

Sixty-six years later, in *Edelman v. Jordan*, the Court reaffirmed the jurisdictional divide laid out in *Ex Parte Young*. Holding that a federal suit requiring "payment of state funds, not as a necessary consequence of compliance in the future with

a substantive federal-question determination, but as a form of compensation, . . . [i.e.] a retroactive award of monetary relief" was barred by the Eleventh Amendment, the Court reiterated that suits for prospective equitable relief and retroactive damages are treated differently under the Amendment, stating that prospective relief is permissible, but retroactive damages are not. *Edelman*, 415 U.S. at 668. The Court, in essence, redefined a state's Eleventh Amendment sovereign immunity as freedom from an "action . . . for the recovery of money from the state [when] the state, is the real, substantial party in interest"; *Edelman*, 415 U.S. at 663 (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945)), not freedom from "compliance in the future with a [federal court's] substantive federal-question determination." *Edelman*, 415 U.S. at 668.

In *Milliken v. Bradley*, 433 U.S. 267 (1977), the Court expanded somewhat the notion of what "prospective" relief involves, by holding that ordering a state to put into effect, at public expense, a program which would remedy the effects of a school district's past discrimination did not violate the Eleventh Amendment. The Court held that the plan, although "compensatory" in nature, "operate[d] *prospectively* to bring about the delayed benefits of unitary school system," *Id.* at 290, and did not award damages for past operations of the segregated school system. The Court's insistence on fitting such relief under a "prospective" label solidified the distinction it has drawn between prospective and retroactive relief in setting the boundaries of the Eleventh Amendment's bar on suits against a state in federal court. The distinction accommodates an individual's right to obtain relief in federal court from state officials' unconstitutional actions with the states' right not to have their public coffers depleted with large retroactive damage awards. *See Townsend v. Edelman*, 518 F.2d 116, 121 (7th Cir. 1975).

Appendix A

Santiago's suit for damages due to his emotional distress because of DOCS' alleged violation of the Fourteenth Amendment is a suit for retroactive damages, and as such, runs into the Eleventh Amendment jurisdictional bar as it has been developed from *Hans* through *Milliken v. Bradley*. Santiago argues, however, that his action under § 1 of the Fourteenth Amendment fits into both of the Supreme Court's exceptions to this jurisdictional bar.

At the same time that the Court was developing a definition of what the Eleventh Amendment meant — determining, in the face of the federal mandate of the Fourteenth Amendment, the extent to which states could be sued in federal court for violations of that mandate, and crafting a compromise notion that the Eleventh Amendment bar reached retroactive damage actions, but no further — the Court was developing a jurisprudence of exceptions to the workings of the Eleventh Amendment altogether. If a suit fell under one of these exceptions, a state could be sued for equitable relief, or damages, or both, because the Eleventh Amendment's bar on damages would not apply. The first of these exceptions occurs when Congress passes a statute abrogating the states right to immunity in the particular context of that statute. Such Congressional abrogation occurs, however, "only [when Congress] mak[es] its intention unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). The second exception occurs when the states themselves decide to waive their immunity to suit in federal court. Waiver will only be found, however, "where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman*, 415 U.S. at 673, (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). States cannot "constructively consen[t]" to waiver of their Eleventh Amendment protection from

suit. *Edelman*, 415 U.S. at 673.

Santiago argues, and Judge Patterson found, that his Section 1 action fits the "clear statement" exception to immunity, because Section 1 of the Fourteenth Amendment itself abrogated states immunity from suit in federal court. Congress meant the substantive provisions of the Fourteenth Amendment to apply to the states, Santiago argues, and therefore intended to create a cause of action against the states for their violation. We believe, however, that Section 1 by itself fails to meet the standards of the "clear statement" abrogation exception.

In relevant part, the Fourteenth Amendment provides:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens or the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Although Section 1 "by express terms" applies to the states, and by it Congress clearly impressed upon the states "duties with respect to their treatment of private individuals," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976), the language of the section nowhere expresses an intent to abrogate a state's immunity from suit for damages resulting from a violation of these duties. Section

1, on its own, has been found to support a cause of action for prospective relief against a state official as demonstrated by *Ex Parte Young* and *Milliken v. Bradley,* but no Supreme Court decision has held that Section 1 in itself will support a retroactive damage action against a state.

Instead, in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976), the Court held that Congress could pass a statute pursuant to § 5 of the Amendment which would allow individuals to sue states for retroactive damages from job discrimination, a clear abrogation of the states' Eleventh Amendment immunity. The *Fitzpatrick* Court, in holding that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts" implied that Section 1 alone, without any accompanying § 5 action, was insufficient to permit private suits against states or state officials in the face of Eleventh Amendment immunity. Something more than Section 1's imposition of substantive duties on the states seems to be needed before one may conclude that Congress has clearly stated its intent to abrogate immunity. The clear implication of *Fitzpatrick* is that this something more is a Congressional enactment made pursuant to its § 5 enforcement powers. *See Vakas v. Rodriguez,* 728 F.2d 1293, 1296 (10th Cir. 1984) ("Express waiver of the Eleventh Amendment by congressional action is required under the enforcement mechanism of the Fourteenth Amendment. . . . [citations omitted]. Where, as here, Congress has chosen not to enact an enforcement scheme *directly* addressing the appellant's situation, the state retains its sovereign immunity".) [citations omitted]

Acting under § 5, Congress has repeatedly enacted legislation

that has clearly stated Congress' intention to abrogate states' immunity from damage actions in a variety of contexts. *See, e.g.* 29 U.S.C. § 794(a) (Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978); 29 U.S.C. § 626(b) (Age Discrimination in Employment Act); 42 U.S.C. § 2000d-7 (Title VI of the Civil Rights Act of 1964). Yet not all Congressional actions under § 5 of the Fourteenth Amendment to enforce Section 1 contain the express language to abrogate immunity required by the clear statement exception. For example, as the district court recognized, the Court has held that 42 U.S.C. § 1983 does not provide an explicitly clear statement demonstrating Congress' intent to abrogate the Eleventh Amendment. *See Quern v. Jordan*, 440 U.S. 332 (1979). "[N]either logic, circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of [§ 1983] compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several states." *Quern*, 440 U.S. at 342. If a clear statement to abrogate was not found in *Quern*, in the context of a specific Congressional enactment to enforce Section 1's substantive provisions, it seems all the more difficult to discover one lurking in those substantive provisions themselves, bereft of any accompanying or clarifying § 5 action spelling out a cause of legislation for violation of the Amendment. The logical implication from *Quern* is that if § 1983 did not abrogate traditional Eleventh Amendment immunity, Section 1 of the Fourteenth Amendment by itself surely does not; otherwise there would have been no sovereign immunity left intact for Congress to have failed to abrogate when passing § 1983 in 1871.

Santiago, however, supported by the district court, would have us dismiss all of the above because of a reference in *Milliken v. Bradley* to language in *Fitzpatrick v. Bitzer* that speaks in general

terms of federal court enforcement of the express prohibitions on state conduct contained in the substantive provisions of the Fourteenth Amendment. *Milliken*, 433 U.S. at 291. However, the reference in *Milliken* occurred in the context of *Milliken's* discussion of whether the remedy imposed on the school district there violated "the *Tenth* Amendment and general principles of federalism." *Id.* (emphasis added). Nowhere does *Milliken* cite to *Fitzpatrick* for the proposition that the duties imposed by Section 1 of the Fourteenth Amendment on the states abrogated their *Eleventh Amendment* immunity from damage suits. Indeed, *Fitzpatrick* cannot be cited for this principle, because it specifically found Eleventh Amendment abrogation pursuant to § 5 of the Fourteenth Amendment, not Section 1.

Santiago argues, as well, that the second exception to Eleventh Amendment immunity applies in the case of Section 1 of the Fourteenth Amendment — the waiver exception. By ratifying the amendment, he argues, states "either engaged in a rhetorical exercise, a charade, or they waived their own immunity from suit, assuming they then had such immunity to begin with." In so arguing, Santiago engages in his own rhetorical exercise, but fails to demonstrate how ratification of an amendment amounts to a waiver of immunity " 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman*, 415 U.S. at 673 (citing *Murry v. Wilson*, 213 U.S. 151, 171 (1909). As there is no sign in the legislative history of the Amendment or in its text that the states, by assenting to the imposition of certain duties upon them, also assented to the waiver of their traditional immunity from damage actions against them in federal court, we are unpersuaded that the states, in ratifying the Fourteenth Amendment, waived their Eleventh Amendment immunity under the recognized exception.

In conclusion, since Santiago's suit for compensation for emotional damages is barred by the Eleventh Amendment, and since Section 1 of the Fourteenth Amendment fits neither the clear statement nor the state waiver exceptions to a state's immunity from damage suit in federal court, we hold that his suit is jurisdictionally barred.

B. *Creation of a Bivens Cause of Action Against DOCS*

Because a federal court is without jurisdiction to hear Santiago's suit, it does not have the power to create a *Bivens* cause of action aimed directly at states or their agencies for money damages because of a violation of the Fourteenth Amendment. As *Bivens* actions are routinely dismissed against the United States itself because of sovereign immunity, *see Mack v. United States*, 814 F.2d 120, 122-123 (2d Cir. 1987), so it follows that they should likewise be dismissed against states and state agencies in federal court because of Eleventh Amendment immunity as to retroactive damages.

C. *The Equitable Claim*

Although Santiago's claim for an injunction against DOCS is not barred by the Eleventh Amendment's ban on retroactive damage actions, it too must be dismissed because it does not follow the requirement, established in *Ex Parte Young*, that a plaintiff seeking prospective relief from the state must name as defendant a state official rather than the state or a state agency directly, even though in reality the suit is against the state and any funds required to be expended by an award of prospective relief will come from the state's treasury. *See Penhurst State Hospital School and Hospital v. Halderman*, 465 U.S. 89, 102, 104-5 (1984). Santiago has not used this *Ex Parte Young* "fiction," in framing

his suit, and therefore his equitable cause of action must also be dismissed.

Reversed with instructions to dismiss the complaint against DOCS.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 29, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 2069 (RPP)

RAFAEL SANTIAGO,

Plaintiff,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and DR. MELVIN J. STEINHART,

Defendants.

OPINION

ROBERT P. PATTERSON, JR., U.S.D.J.

This is a motion to dismiss for improper service of process under Federal Rule of Civil Procedure 4(d), for failure to state a cause of action under Federal Rule of Civil Procedure 12(b)(6) and for lack of subject matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3).

Plaintiff Rafael Santiago, a hispanic employee of the New York State Department of Correctional Services (DOCS), seeks redress for damages incurred as a result of incidents surrounding his being placed on involuntary leave in August 1987. The defendants are DOCS and Dr. Melvin J. Steinhart, a psychiatrist

whose evaluation allegedly played a role in the involuntary leave order.

Plaintiff claims relief under the equal protection clause of the Fourteenth Amendment and 42 U.S.C. § 1985(3) against both defendants. Plaintiff also sues Dr. Steinhart under 42 U.S.C. § 1983.[1]

Background

Plaintiff has been employed by DOCS as a corrections officer since 1978. On June 15, 1987, plaintiff purportedly had an altercation with a superior officer at the Otisville Correctional Facility in Orange County, New York. Plaintiff then requested a leave of absence which was granted. The Complaint alleges that the leave of absence was necessary to relieve

> tension . . . caused by (a) false accusations against him; (b) his superiors' failure to support his rational, job-related decisions and (c) his receipt of an unjustifiably poor work rating.

Comp. at 2, ¶9.

Plaintiff subsequently requested reinstatement after receiving treatment from a privately retained doctor. DOCS, however, refused to allow plaintiff to return to work until a physician from the Employee Health Service (EHS), a division of the New York

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1. Plaintiff concedes that *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989), and *Patterson v. McClean Credit Union*, 109 S.Ct. 2363 (1989), respectively bar Section 1983 claims against DOCS and Section 1981 claims against both defendants.

State Department of Civil Services, conducted an evaluation. On July 6, 1987, Dr. John Hargraves examined plaintiff. Dr. Hargraves then referred plaintiff to defendant Dr. Melvin Steinhart for additional psychiatric evaluation.

Dr. Steinhart is a private psychiatrist, licensed to practice in New York, to whom EHS regularly refers patients. In early July 1987, Dr. Steinhart met with plaintiff for a session of approximately ninety minutes. On July 27, 1989, Dr. David Horenstein performed additional psychological testing. Based on Dr. Horenstein's report and his own observations, Dr. Steinhart wrote in August 1987 to EHS recommending continued medical leave of absence and no disciplinary action.

DOCS then informed plaintiff that as of August 13, 1987, he would be placed on involuntary leave of absence and subject to further evaluations pursuant to New York Civil Service Law §§ 72(1) and 72(5).

On August 20, 1987, plaintiff filed with DOCS an appeal of the involuntary leave decision. DOCS responded by referring plaintiff to Dr. Steinhart for another evaluation. On September 15, 1987, Dr. Steinhart interviewed plaintiff for fifteen minutes. The Complaint alleges, "The doctor then prepared a materially misleading and false report, dated September 15, 1987, which the D[O]CS relied upon in determining that Santiago continued to be mentally unfit for service," Comp. at 3, ¶18.

The Complaint alleges that Dr. Steinhart and DOCS engaged in an

> effort to label Santiago mentally unfit . . . contrived to avoid invoking disciplinary

> proceedings which would have focused attention on the continued abuse plaintiff sufferec at the instance of superior officers.

Comp. at 4, ¶4.

In October 1987, DOCS conducted several days of hearings on the involuntary leave decision. The hearing officer affirmed that plaintiff should not be allowed to return to work because of mental unfitness. In late December 1987, DOCS notified plaintiff that, in light of the hearing officer's opinion, involuntary leave would continue indefinitely.

Plaintiff contends that DOCS's decision to continue involuntary leave was part of "a pattern of systematic and intentional discrimination in the terms and conditions of employment practiced by defendant DOCS against minority (Black and Hispanic) C[orrections] O[fficer]s." Comp. at 5, ¶27.

Plaintiff then appealed to the New York State Civil Service Commission under Civil Service Law § 72(3). After a hearing in April 1988, the Commission reversed DOCS's decision and found that as of July 15, 1987, plaintiff had been mentally fit for work. The Commission ordered plaintiff reinstated and awarded back pay and benefits. According to the Complaint, "the Civil Service Commission . . . lacked the authority to, and did not, award him [plaintiff] compensation for the pain and suffering he endured at the hands of these defendants, or for the fees and costs sustained in defeating D[O]CS's claim that he was mentally unfit for work." Comp. at 4, ¶26.

Plaintiff seeks compensatory and punitive damages for the mental distress and the expenses incurred in fighting the alleged

"determined effort to declare him mentally incapable of working." Comp. at 7, ¶39(b). Plaintiff also seeks to enjoin any retaliatory activity by DOCS in response to the initiation of this lawsuit.

Discussion

I. Rule 4(d)

Dr. Steinhart contends that the complaint should be dismissed because plaintiff did not properly serve him with process. According to Dr. Steinhart, the process server delivered the summons and complaint to a colleague of Dr. Steinhart at the Albany Medical Center, Department of Psychiatry, Within the next fifteen minutes, Dr. Steinhart received the summons and complaint. Plaintiff does not contend that the colleague was an agent of Dr. Steinhart.

Technically, none of the specific provisions of Rule 4(d) are satisfied by this mode of service. However, the due process requirement that defendants receive notice of the proceedings was satisfied. *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314-15 (1950).

Under the spirit of Rule 4(d), "actual receipt of the summons and complaint at the particular place where it is served may be the real key to the disposition of many cases." Wright and Miller, Federal Practice and Procedure § 1096, at 78 (1987) (citing *Knarlsson v. Rabinowitz*, 318 F.2d 666 (4th Cir. 1963)). Although service of process at one's place of work often is a grounds for dismissal, under the circumstances of this case "it makes little sense to construe Rule 4(d)(1) technically when actual notice has been received; to do so would be inconsistent with the spirit of the federal rules." Wright and Miller, *supra* at 80. The Court denies the motion to dismiss for improper service of process.

Appendix B

II. Section 1985(3)

Both defendants move to dismiss the claim under Section 1985(3) for failure to state a cause of action upon which relief can be granted. Section 1985(3) provides for relief when:

> two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . .

Plaintiff's claim fails to satisfy Section 1985(3)'s threshold requirement of a conspiracy between "two or more persons." The only two possible "persons" in the complaint are Dr. Steinhart and DOCS. The latter is a state agency. The complaint names no individuals from DOCS.

"It is well settled that a state and its agencies are not 'persons' under §§ 1983 and 1985." *Rode v. Dellaciprere*, 617 F.Supp. 721 (M.D.Pa. 1985) (citations and footnote omitted). Plaintiff's brief fails to address any of the cases cited by defendants that stand squarely for the proposition that a state agency like DOCS cannot be used to satisfy the Section 1985(3) predicate of "two or more persons." *See Richards v. New York State Dept. of Correctional Services*, 572 F.Supp. 1168, 1172 (S.D.N.Y. 1983); *Thompson v. New York*, 487 F.Supp. 212, 228 (N.D.N.Y. 1979); *Allah v. Commissioner of the Dept. of Corrections*, 448 F.Supp. 1123, 1125 (N.D.N.Y. 1975) (citing *Curtis v. Everette*, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974)).

The Court also finds guidance in the Supreme Court's recent holding that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dept.*

of State Police, 109 S.Ct. 2304, 2312 (1989). There is a principal that "under §§ 1983 and 1985 the term 'persons' has the same meaning. *An-Ti Chai v. Michigan Technological University*, 493 F.Supp. 1137 (W.D.Mich. 1980); *Thompson v. State of New York*, 487 F.Supp. 212[, 228] (N.D.N.Y. 1979)." *Rode*, 617 F.Supp. at 723 n.2. Plaintiff was aware of the *Will* decision at the time of filing its brief, *see* Pl. Br. at 1 n.1, and has made no attempt to establish that in 1871 Congress intended to define "persons" in Section 1985 differently than it had that same year in Section 1983. *See Will*, 109 S.Ct. at 2311 ("examination of the authorities of the era suggests that the phrase was . . . not to include the States." (citations omitted).

The Complaint fails to state a claim under Section 1985(3) because the prerequisite of "two or more persons" is unsatisfied.

III. Section 1983

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Plaintiff concedes that he cannot bring a Section 1983 claim against DOCS because of the holding in *Will v. Michigan Dept. of State Police, supra*, that a State is not a "person" under Section

1983. Plaintiff does not concede that *Will's* holding that a state official acting in his official capacity affects the Section 1983 claim against Dr. Steinhart.

Dr. Steinhart attempts to portray the Section 1983 claim against him as an action against a privately retained physician. Unless a privately retained doctor acts in a conspiracy with the state, those physicians are "consistently . . . dismissed from § 1983 actions for failing to come within the color of state law requirement of this section." *Briley v. California*, 564 F.2d 849, 855-56, 858 (9th Cir. 1977).

However, Dr. Steinhart mischaracterizes the Complaint. Although the Complaint does allege a "conspiracy" between the doctor and the State agency[2], Dr. Steinhart is portrayed as a state official rather than a private individual. DOCS hired Dr. Steinhart. The doctor's duties were to aid New York State in its initial determination of plaintiff's mental fitness and in its preparation for the Section 72 hearing.

The Complaint states, "At all times, Steinhart acted as an agent of the Employee Health Services, an instrumentality of the

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2. The alleged "conspiracy" is not the type of joint activity that makes a privately retained doctor into a state actor. *See Briley*, 564 F.2d at 858. For a private individual's actions to be attributable to state action, there must be allegations not only of a common goal or similar intent, but also of a mutual understanding or agreement. *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206-08 (7th Cir. 1980) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)); *Slotnick v. Staviskey*, 560 F.2d 31 (1st Cir. 1977); *Obeda v. Connecticut Board of Registration for Professional Engineers and Land Surveyors*, 570 F. Supp. 1007, 1016-17 (D.Conn. 1983). The Complaint lacks any reference to a mutual understanding and only alleges that Dr. Steinhart facilitated the state's plan.

State of New York." Comp. at 5-6, ¶33. The next paragraph alleges that Dr. Steinhart acted in "his official capacity as an agent of the State." Comp. at 6, ¶34. Taken together those two paragraphs allege that all acts of Dr. Steinhart described in the Complaint are those of a state official.[3]

The Complaint alleges that Steinhart is "liab[le] in his individual capacity, as well as his official capacity." Comp. at 6, ¶34. Will's broad holding prevents a court from holding an "agent of the state" with an "official capacity" liable under Section 1983. 109 S.Ct. at 2311-12. However, Dr. Steinhart can be held liable in his individual or personal capacity.

"On the merits, to establish personal liability in a § 983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). As already discussed, Dr. Steinhart allegedly acted under color of state law by virtue of his position as a state agent. The only remaining issue is whether the Complaint alleges that Dr. Steinhart by his alleged intentionally false acts and malicious conduct deprived plaintiff of a federal right.

The Complaint alleges that Dr. Steinhart violated the equal protection clause. State action is a prerequisite to an equal protection violation. The essence of the state action standard is whether any deprivations of equal protection committed by Dr. Steinhart can be attributed to the government. *Lugar v.*

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3. Plaintiff's characterization of Dr. Steinhart as a state official in the Complaint enables the defendant to assert immunity defenses in his answer as to acts within the course and scope of his official duties for which he is being sued personally.

Edmondson Oil Co., Inc., 457 U.S. 922, 937-39 (1982). Those allegations of the Complaint that satisfy the "under color of state law" requirement of Section 1983 also satisfy the Fourteenth Amendment's state action requirement in this case. *See Id.* at 935 & n.18.[4]

The alleged state action of Dr. Steinhart infringes upon the equal protection clause. The Complaint alleges that Dr. Steinhart intentionally utilized his position as an agent of DOCS to discriminate intentionally against plaintiff due to his hispanic origin. A suspension from employment due to a state actor's racial discrimination violates the equal protection clause. *See Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714, 721 (1963); *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982); *Langford v. City of Texarkana*, 478 F.2d 262, 266 (8th Cir. 1973) ("Racially discriminatory State action in employment is unlawful under the Equal Protection clause of the Fourteenth Amendment.") (citing *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952)); *cf. Ad Hoc Committee of Concerned Teachers v. Greenburgh #11 Union Free School District*, 873 F.2d 25, 29 (2d Cir. 1989) (discussing how a 'would-be teacher . . . might be the most logical person to challenge the [D]istrict's hiring practices' under the equal protection clause) (quoting *Otero v. Mesa County Valley School District*, 568 F.2d 1312, 1314 (10th Cir. 1977); *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988) (pattern of harassment against public employee motivated by

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4. Dr. Steinhart also argues that the action must be dismissed because *Lugar* holds that a defendant does not act under color of state law simply by invoking a state proceeding. That aspect of *Lugar* is inapplicable to this case, because the state action requirement is satisfied by Dr. Steinhart's official agency relationship with DOCS rather than simply by a connection between his acts and the invocation of Section 72 proceedings.

invidious discrimination is actionable under equal protection clause).

The Complaint sufficiently pleads an action against Dr. Steinhart in his personal capacity, because Dr. Steinhart is designated as a state actor who allegedly engaged by personal actions in invidious racial discrimination against a public employee. The motion to dismiss plaintiff's Section 1983 claim is granted as to DOCS and Dr. Steinhart in his official capacity and is denied as to Dr. Steinhart in his personal capacity.

IV. Equal Protection

Plaintiff asserts claims under the equal protection clause of Section 1 of the Fourteenth Amendment against Dr. Steinhart and DOCS. The Court need not address the possibility of a direct cause of action under the Fourteenth Amendment against Dr. Steinhart in his personal capacity, because the same relief is available under the express remedy provided by Section 1983. *Cf. Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (no direct cause of action under the Constitution when Congress has created an alternative remedy as "a *substitute*"). *Will* holds that the enactment of Section 1983 created no rights against states or state officials in their official capacity. Since Section 1983 does not provide for relief against DOCS or Dr. Steinhart in his official capacity, it must be determined if plaintiff has rights to relief against them arising directly under the Constitution.

A. Eleventh Amendment

Plaintiff's claims for retroactive relief must overcome hurdles of sovereign immunity under the Eleventh Amendment with respect to both the claim against the State agency DOCS and the official

capacity claim against Dr. Steinhart.

1. DOCS

In *Holley v. Lavine*, 605 F.2d 638, 648 (2d Cir. 1979), the Second Circuit decided it could, in view of its other holdings in that case, "leave to another day consideration of" the "complicated" question of whether the Eleventh Amendment immunizes a state agency against damage actions brought directly under the equal protection clause of Section 1 of the Fourteenth Amendment. *See also Edelman v. Jordan*, 415 U.S. 651, 694 n.2 (1974) (Marshall, J., dissenting) (Court has "not decide[d] whether the States' Eleventh Amendment immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that [Fourteenth] Amendment . . . ."); *United States v. DCS Development Corp.*, 590 F. Supp. 1117 (W.D.N.Y. 1984) (refusing "to go further in this case than was deemed prudent in *Holley v. Lavine*").[5]

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

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5. Courts in this Circuit have been able to avoid this issue because the relief sought was available without reaching the sovereign immunity issue. *See Holley*, 605 F.2d at 648 ("[W]e see no persuasive reason to consider these matters. We have already concluded that plaintiff is entitled to a judgment against the County defendant for the same amount she could recover against the State defendant."); *United States v. DCS Development Corp.*, 590 F. Supp. 1117, 1122 ("I see no great harm in relegating these defendants to the New York Court of Claims, wherein the State of New York has consented to be sued . . ., for the prosecution of their constitutional claims"). In the case at hand, defendants have been unable to point to an alternative which may yield full recovery for the damages claimed here.

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Since *Hans v. Louisiana*, 134 U.S. 1, 10 (1890), the Supreme Court has interpreted the Eleventh Amendment to render states and state agencies immune from suits for damages in federal court even where jurisdiction is premised on a federal question.

Two exceptions to the blanket jurisdictional ban of *Hans* have developed. The first occurs when a congressional enactment clearly intends to hold states liable for damages. *See Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273, 2281 (1989) (plurality); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *County of Monroe v. Florida*, 678 F.2d 1124, 1131-1132 (2d Cir. 1982) (explaining *Edelman v. Jordan*, 415 U.S. 651, 672 (1974) and *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 (1973)), cert. denied, 459 U.S. 1104.

The second exception is when a state consents to liability. *See Clark v. Barnard*, 108 U.S. 436 (1883); *Parden v. Terminal Railway*, 377 U.S. 184 (1964). Evidence of a state's waiver must be strong, *Edelman*, 415 U.S. at 673, but it can be in the form of "constructive consent." *Petty v. Tennessee Missouri Bridge Commission*, 359 U.S. 275 (1959). *See County of Monroe v. Florida*, 678 F.2d at 1133.

The issue presented by plaintiff's claim against DOCS is whether an action brought directly under the equal protection clause falls within an exception to *Hans*. Section 1 of the Fourteenth Amendment potentially embodies both exceptions to state sovereign immunity, because the Fourteenth Amendment was adopted after the Eleventh Amendment and pursuant to both

the approval of Congress and the consent of the states. If Section 1 expresses an intent to hold states liable, then Section 1 constitutes an exception to *Hans*. Although a constitutional provision has never been held to be an exception to the sovereign immunity doctrine, there is no rational reason why the 'law of the land' cannot just as readily satisfy the conditions for an exception as a statute.

On its face, Section 1 is an explicit restriction upon states. Section 1 states in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Justice Rehnquist, writing for the Court in *Fitzpatrick v. Bitzer*, recognized that Section 1 is "by express terms directed at the States." 427 U.S. at 453 (discussing both Section 1 and Section 5). Supreme Court dicta also discusses the historical role of the Fourteenth Amendment in shifting power to the federal government to restrict state governments. *See Pennsylvania v. Union Gas*, 109 S.Ct. at 2282 (plurality); *Id.* at 2302 (Scalia, J., concurring in part and dissenting in part); *Fitzpatrick*, 427 U.S. at 453-55.

Furthermore, Section 1 has long been recognized as a self-executing provision of law directed at states. *See The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation"); *Gentile v. Wallen*, 562 F.2d 193, 196 (2d Cir. 1977) (upholding

valid cause of action directly under Fourteenth Amendment with citations to "at least five other circuits [which] have recognized causes of action directly under the Fourteenth Amendment").

In the seminal case of *Ex Parte Young*, 209 U.S. 123 (1908), the Court enjoined the state of Minnesota from violating Section 1 of the Fourteenth Amendment. Since *Ex Parte Young* there has been a series of prominent cases arising directly under the equal protection clause. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954); *Milliken v. Bradley*, 433 U.S. 267 (1977); *University of California v. Bakke*, 438 U.S. 265, 289 (1978); *Plyler v. Doe*, 457 U.S. 202 (1982).

In *Milliken v. Bradley*, 433 U.S. 267, 291 (1977), the Court upheld "a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)." *Milliken's* cite to *Fitzpatrick* is significant, because in *Fitzpatrick* the Court held that a statute enacted pursuant to Section 5 could constitute an exception to the Eleventh Amendment.[6] The cite in *Milliken* to *Fitzpatrick* indicates that the Court views *Milliken's* self-executing application of Section 1 to unlawful state conduct to be analogous to *Fitzpatrick's* application to a

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6. *Fitzpatrick* only addressed the relation between Section 5 of the Fourteenth Amendment and the Eleventh Amendment. *Milliken's* citation to *Fitzpatrick* comes from the Supreme Court's explanation of why a federal court remedy in an action brought under Section 1 of the Fourteenth Amendment is not limited by Tenth Amendment restrictions on federal interference with "the integrity of the structure and functions of state and local government." 433 U.S. at 291. Since there was no Tenth Amendment issue in *Fitzpatrick*, the reasoning of *Fitzpatrick* is even more readily applicable to the issue of whether an action under Section 1 of the Fourteenth Amendment is limited by the Eleventh Amendment.

state of a federal statute enacted pursuant to Section 5 of the Fourteenth Amendment.[7]

Accordingly, *Milliken* views the equal protection clause as not requiring the enforcing legislation permitted under Section 5 for the Eleventh Amendment to be limited. Since Section 1 of the Fourteenth Amendment, adopted after the Eleventh Amendment, expresses the intent of Congress and the States to have the equal protection clause apply to the States despite the doctrine of sovereign immunity, the Eleventh Amendment does not bar this action brought against a New York State agency under Section 1 and the Court has jurisdiction over this constitutional cause of action.

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7. The relief awarded in Section 1 cases like *Ex Parte Young* and *Milliken* is limited to prospective relief, while in the case at hand plaintiff seeks retroactive relief in the form of money damages. The portion of the *Ex Parte Young* and *Milliken* holdings limiting remedies to prospective relief is explained in *Edelman v. Jordan, supra*. That rule, however, is not applicable to this case.

In *Edelman*, Justice Rehnquist explained the *Ex Parte Young* fiction and its limitations. The *Ex Parte Young* fiction enables a plaintiff to evade the scrutiny of the Eleventh Amendment by suing a state official in his official capacity rather than the state or state agency. In reality the suit is against the state and state funds are at stake, but the simple device of naming only an officer in the caption renders state sovereign immunity inapplicable. *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102, 104-05 (1984).

The *Edelman* Court held that when the *Ex Parte Young* fiction is used, only prospective relief could be sought. In this case, plaintiff has not tried to evade the Eleventh Amendment by resorting to the *Ex Parte Young* fiction. Plaintiff's contention is that the Eleventh Amendment does not apply because the exceptions to the Eleventh Amendment of congressional intent and state waiver apply. When an exception to the Eleventh Amendment applies, retroactive monetary relief is permitted. *See, e.g., Fitzpatrick, supra*. There is, however, still the issue of whether the equal protection clause provides grounds for retroactive relief. *See supra* Section IV:B.

Appendix B

2. Dr. Steinhart

An official capacity action can be maintained despite the Eleventh Amendment only in limited circumstances. *See Edelman v. Jordan, supra; Ex Parte Young, supra.* The Supreme Court's Eleventh Amendment jurisprudence unequivocally bars plaintiff from recovering retroactive damages against a defendant in his official capacity. *See supra* note 7 (discussing *Ex Parte Young* and *Edelman v. Jordan*). Since the equal protection claim against Dr. Steinhart in his official capacity is for retroactive relief, it is dismissed.

B. Fourteenth Amendment

Even though the Eleventh Amendment does not immunize DOCS from an equal protection violation, an issue still remains as to whether the equal protection clause permits the retroactive relief sought by plaintiff. As determined in the Section 1983 discussion, the allegations of invidious racial discrimination in public employment are sufficient to state a cause of action under the equal protection clause. The issue is whether monetary compensation is an appropriate form of relief under the equal protection clause.

As discussed above, plaintiff has no cause of action against DOCS under the civil rights statutes. Furthermore, plaintiff's remedies before the State Civil Service Commission and under Title VII only permit recovery of back pay and benefits. Thus, plaintiff brings this action under the Constitution to obtain compensation for his expenses and emotional suffering allegedly caused by DOCS' invidious discrimination.[8]

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8. DOCS has not cited "statutory language or clear legislative history" (Cont'd)

Appendix B

When there is no statutory remedy available, the Supreme Court has upheld damage remedies stemming from constitutional violations in what has come to be known as *Bivans* actions. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971). In *Davis v. Passman*, 442 U.S. 228, 242 (1979), the Court wrote:

> [U]nless such [justiciable constitutional] rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce those rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

The *Davis v. Passman* court then upheld a damages remedy for

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(Cont'd)

providing that a constitutional cause of action against a state agency for expenses and emotional injury cannot complement the statutory schemes for recovery. *Cf. Bush v. Lucas*, 462 U.S. 367, 378 (1983) (discussing when alternative statutory remedies bar a cause of action directly under the Constitution).

In *Schweiker v. Chilicky*, 108 S.Ct. 2460, 2466-68 (1988), *Bush v. Lucas*, *supra*, and *Chappel v. Wallace*, 462 U.S. 296 (1983), special factors of United States fiscal, personnel and military policy dictated that it would be inappropriate for the judiciary to supplement congressional remedies. By contrast, this is a cause of action against a state agency rather than a federal defendant. It would be contrary to the intention of the Fourteenth Amendment to defer to incomplete statutory remedies for violations of equal protection by a state. *See Ellis v. Blum*, 643 F.2d 68, 83-84 (2d Cir. 1981) (constitutional action against state defendants).

public employment discrimination in violation of equal protection, because computing the damages would not impose upon the district court a historically inappropriate or unmanageable task. *Id.* at 245.

The plaintiff in *Davis v. Passman* only sought back pay, while Mr. Santiago seeks damages for the out of pocket expenses and "profound mental distress; humiliation; degradation; embarrassment and social isolation" resulting from the state agency's alleged equal protection violation. Comp. at 4, ¶ 25. Since plaintiff has already received back pay, the issue arises whether he has already been afforded complete relief and whether the Court would be overstepping its bounds by providing an opportunity for additional relief.

The facts of *Schweiker v. Chilicky*, 108 S.Ct. 2460 (1988), would seem to counsel that the Court not give plaintiff the opportunity to receive emotional damages. *Schweiker* was a *Bivens* action premised upon a denial of welfare benefits in violation of due process. The Federal Social Security program provided administrative procedures through which plaintiffs were awarded full retroactive welfare benefits. The plaintiffs in *Schweiker* then brought a *Bivens* action in which they sought damages for emotional suffering to complement the award of retroactive benefits. The Supreme Court dismissed the case because the relief sought was unavailable as a matter of law.

A closer examination of *Schweiker*, however, reveals that the holding has no bearing on this case. The basis for the holding in *Schweiker* was not the unavailability of emotional damages for a constitutional tort, but the presence of a "special factor" — interference with another political branch of the federal government — which prohibits a court from recognizing a *Bivens*

action. 108 S.Ct. at 2466-68.[9] Justice Brennan noted in his dissent in *Schweiker*, "The Court does not for a moment suggest that the retroactive award of benefits to which respondents have always been entitled remotely approximates full compensation for such trauma." 108 S.Ct. at 2472 (Brennan, J., dissenting).

Indeed, the Supreme Court has repeatedly emphasized the importance of providing damages for emotional suffering.[10] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), defined the term "actual injury" to include out of pocket expenses and "personal humiliation and mental anguish and suffering." The Supreme Court included emotional and mental distress within the appropriate scope of damages for a due process violation in *Carey v. Piphus*, 435 U.S. 247, 263-64 (1978), because "[d]istress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff."

In addition, the original constitutional tort case, *Bivens*, was an action for damages for the "great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct." 403 U.S. at 389-90. The Supreme Court held that a cause of action existed in *Bivens* because the emotional damages sought were a "particular remedial mechanism normally available in the federal courts." *Id.* at 397 (citing *Marbury v. Madison*, 1 Cranch 137, 163 (1803), for the proposition that for every injury caused by

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9. That "special factor" is not present in this case, because plaintiff is suing a state agency under the Fourteenth Amendmant. *See supra* note 8.

10. The Supreme Court has designated the terms "mental suffering" and "emotional anguish" and "distress" to be equivalent, *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978), and they are used interchangeably throughout this opinion.

the deprivation of a civil right there must be a remedy). *See also Ellis v. Blum*, 643 F.2d 68, 83-84 (2d Cir. 1981) (following *Davis v. Passman's* mandate not to leave constitutional torts unaddressed).

DOCS has provided no reason why emotional damages should be available for due process and Fourth Amendment violations, but not equal protection deprivations. The rules governing compensation for injuries caused by a deprivation of constitutional rights should be tailored to the particular right in question. *Carey v. Piphus*, 435 U.S. at 259. The mental dignity and emotional integrity of racial minorities has been at the crux of the Supreme court's equal protection jurisprudence since the abandonment of the doctrine of separate but equal. The Court finds an award for emotional damages and out of pocket expenses to be appropriate for the alleged deprivation of equal protection by a state agency's intentional racial discrimination.

Conclusion

The motion to dismiss is denied in part and granted in part. The Complaint is dismissed in its entirety as to Dr. Steinhart in his official capacity. The Court has jurisdiction and the Complaint alleges causes of action under Section 1983 against Dr. Steinhart in his personal capacity and under the equal protection clause against DOCS. All other causes of action are dismissed. SO ORDERED.

Dated: New York, New York
November 29, 1989

s/ Robert P. Patterson, Jr.
ROBERT P. PATTERSON, JR.,
U.S.D.J.

Appendix B

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(3)

No. 91-954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RAFAEL SANTIAGO,

Petitioner,

—against—

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Petitioner, an employee of respondent New York State Department of Correctional Services ("DOCS"), a state agency, commenced this action in the United States District Court for the Southern District of New York, alleging, *inter alia*, a violation of his rights under the Fourteenth Amendment of the United States Constitution and seeking an award of damages against DOCS for pain and suffering, as well as an injunction prohibiting DOCS from retaliating against him. The district court held that monetary relief in an action brought under the Fourteenth Amendment is not barred by the Eleventh Amendment. The opinion is reported at 725 F. Supp. 780 (S.D.N.Y. 1990). The United States Court of Appeals for the Second Circuit unanimously reversed in an

opinion reported at 945 F.2d 25 (2d Cir. 1991). Because the Circuit Court correctly applied the decisions of this Court, taking proper account of the balance established by the Court between these two amendments, and because there is neither a conflict among the circuits nor any other basis for granting a writ of certiorari, respondent urges that the petition for such review be denied.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner is an Hispanic corrections officer employed by DOCS. In June, 1987, following an altercation with a supervisor, he requested and was granted a leave of absence. (JA. 4, 5).[1]

In late June, 1987, petitioner's treating psychologist advised DOCS that petitioner would be able to resume work by July 15, 1987, the expiration date of his leave. (JA. 5). Pursuant to applicable Civil Service regulations, petitioner was referred to the Employee Health Service ("EHS"), a Division of the Department of Civil Service, for an examination to determine whether he could return to work without jeopardizing the health and welfare of other employees. (JA. 6, 15, 66). Petitioner was examined by a physician employed by EHS and by a consulting clinical psychologist. (JA. 16).

Petitioner was then referred to Dr. Melvin Steinhart for an additional psychiatric examination. Dr. Steinhart is an outside consultant and is not employed by the EHS. Based upon his examination, Dr. Steinhart recommended that petitioner's medical leave be continued. (JA. 6, 15, 16).

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1 Numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix in the Court below. Numbers in parentheses followed by the letter "a" refer to pages in the Appendix to the Petition for a Writ of Certiorari.

On August 13, 1987, petitioner was notified he would be placed on an involuntary leave of absence pursuant to New York Civil Service Law § 72(5). (JA. 6, 16). Petitioner objected to imposition of the leave and, pursuant to Civil Service Law § 72(1), requested a hearing to appeal this determination. (JA. 7).

On September 15, 1987, petitioner was re-examined by Dr. Steinhart. Based on this examination, Dr. Steinhart concluded that petitioner was mentally unfit to perform the duties of a corrections officer. (JA. 16).

In October, 1987, a hearing was held on petitioner's appeal (JA. 16-17), at which petitioner was represented by counsel. (JA. 121). The hearing officer determined that petitioner was unable to perform the full duties of a corrections officer by virtue of a medical disability. (JA. 6-7).

Pursuant to Civil Service Law § 72(3), petitioner appealed this determination to the Civil Service Commission, which considered plaintiff's appeal at its April 14, 1988 meeting. The Commission concluded that the facts and evidence in the record did not support DOCS' determination to place petitioner on involuntary leave. Accordingly, the decision of the hearing officer was reversed, petitioner was restored to his position, and DOCS was ordered to restore the leave credits and salary which petitioner had lost during the involuntary leave of absence. (JA. 7, 66).

B. Proceedings in the District Court

Petitioner commenced this action on March 28, 1989, against DOCS and Dr. Steinhart. Petitioner claimed that both defendants had violated his rights under 42 U.S.C. §§ 1981 and 1983, and under the Equal Protection Clause of the Fourteenth Amendment. (JA. 9). In addition, petitioner asserted that Dr. Steinhart had conspired with DOCS personnel, in violation of 42 U.S.C. § 1985(3) (JA. 8), and that as part of that conspiracy, Dr. Steinhart had "prepared a materially misleading and false report . . . which [DOCS] relied upon in finding [petitioner] unfit." (JA. 6). According to

petitioner, DOCS' application of section 72 of the Civil Service Law was part of a pattern of systematic and intentional discrimination against minority (Black and Hispanic) corrections officers. (JA. 8). However, the complaint contained no statistical or other substantiation of the alleged pattern. Plaintiff sought compensatory and punitive damages, together with an injunction prohibiting DOCS from retaliating against him.[2] (JA. 7, 9-10).

On May 31, 1989, DOCS filed a motion to dismiss the complaint, *inter alia*, on the ground that the Eleventh Amendment to the United States Constitution is an absolute bar to the maintenance of this action. (JA. 12-13). In response to DOCS' motion, petitioner conceded that his § 1981 and 1983 claims were barred by this Court's decisions in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) and *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), respectively, but maintained that he still had a valid claim for damages against DOCS directly under the Equal Protection Clause of the Fourteenth Amendment. (JA. 14).

On November 29, 1989, the district court granted DOCS' motion to dismiss the claims based on 42 U.S.C. §§ 1981, 1983 and 1985(3), but held that the Eleventh Amendment is not a bar to petitioner's claim under the Fourteenth Amend-

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2 The fourth question which petitioner seeks to raise before this Court is whether, "in a suit predicated on a state policy and practice," he was required to name individuals as defendants "or lose his right to obtain injunctive relief." In fact, however, petitioner did not seek to enjoin the alleged DOCS' policy upon which his claim is based, even though his analysis of the Fourteenth Amendment would permit the granting of injunctive relief against the State or one of its agencies. Therefore, his question addresses a concern which is not present in this case. Moreover, this Court has unequivocally and consistently held that individuals must be named in order to obtain prospective injunctive relief against alleged unlawful state policies. *See e.g. Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Kentucky v. Graham*, 473 U.S. 159 (1985).

ment.[3] The court based its conclusion on the fact that the Fourteenth Amendment was enacted subsequent to the Eleventh Amendment and expressly provides that "no state shall . . . deny to any person within its jurisdiction equal protection of the law." U.S. Const. Amend. XIV. In the court's view, the Fourteenth Amendment "expresses the intent of Congress and the States to have the equal protection clause apply to the States despite the doctrine of sovereign immunity." (32a).

Both DOCS and Dr. Steinhart moved for reargument. On reargument, DOCS argued that in analyzing whether a direct cause of action lies under the Fourteenth Amendment against a state agency, the court failed to consider the availability of claims under § 1983. The court rejected this argument, stating that "[a] Section 1983 claim against the State is unavailable here because the intention of Congress in enacting Section 1983 was not to include State agencies within the term 'person.' " 734 F. Supp. 653, 654 (S.D.N.Y. 1990) (citation and footnote omitted.) The court denied both defendants' motions to reargue in their entirety. (A.51).

C. Decision of the Court of Appeals

On appeal, the Court of Appeals for the Second Circuit reversed. The court characterized petitioner's argument as "facile" insofar as it was based on the chronological order in which the amendments were adopted. (7a). In the face of the "complex and flexible relation" between the amendments reflected in the decisions of this Court, the court refused to accept the "notion that the later amendment simply erased the earlier." (*Id.*).

The court found that although there are two exceptions to the jurisdictional bar of the Eleventh Amendment, neither

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3 The court dismissed the claims under § 1985(3) since petitioner "fail[ed] to satisfy section 1985(3)'s threshold requirements of a conspiracy between 'two or more persons.' " (22a). The court also granted the motion by Dr. Steinhart to dismiss the § 1983 claim against him, in his official capacity, but denied it insofar as he was named in his personal capacity. (27a). Dr. Steinhart did not appeal.

was satisfied in this case. It rejected petitioner's argument that because Section 1 of the Fourteenth Amendment imposes substantive duties on the States it is a "clear statement" by Congress of its intent to abrogate the States' immunity from actions for damages. (11a). The court noted that the language of the Section "nowhere expresses [such] an intent" (*Id.*), and further noted that in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court found that the States' immunity had been abrogated only on the basis of an express enactment by Congress under Section 5 of the Fourteenth Amendment. In light of this Court's statement in *Bitzer*, that under Section 5 Congress may provide for suits which are "constitutionally impermissible in other contexts," it concluded that, absent a Congressional enactment, "Section 1 alone" is insufficient to overcome Eleventh Amendment immunity. (12a).

The court also rejected petitioner's claim that the States had waived their Eleventh Amendment immunity when they ratified the Fourteenth Amendment. It found that petitioner had failed to demonstrate that ratification, in and of itself, satisfied the strict requirements for a waiver reaffirmed by this Court in *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). (14a).

REASONS FOR DENYING THE WRIT

1. The Second Circuit Correctly Decided That Neither Exception To The Eleventh Amendment Applies

Beginning with *Ex parte Young*, 209 U.S. 123 (1908), this Court has developed, and consistently reaffirmed, a dichotomy with respect to the type of relief a private litigant may obtain from the State in the face of the Eleventh Amendment. The Court has held that prospective injunctive relief may be obtained against a state officer, even if it impacts on the State's treasury, *Milliken v. Bradley*, 433 U.S. 267 (1977), whereas neither injunctive relief, *Papasan v. Allain*, 478 U.S. 265 (1986), nor an award of damages is available against the State or any of its alter egos. *Edelman v. Jordan*, 415 U.S.

651 (1974) (state official sued in his official capacity); *Florida Department of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (per curiam) (state agency). Only where there has been an express waiver by the State, cf. *Edelman*, 414 U.S. at 673, or an explicit Congressional enactment overriding the State's immunity, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), has the Court refused to apply the Eleventh Amendment bar in an action for damages.

The dichotomy represents an attempt to balance the undisputed interests at stake under both amendments. As the authors of one treatise recently observed:

> The Eleventh and Fourteenth Amendments . . . pull in completely opposite directions. While the Eleventh Amendment seeks to protect the states from federal court liability, the Fourteenth Amendment imposes obligations on the states, and § 1983 contemplates that these obligations be enforced in court. Little wonder, then, that Eleventh Amendment decisional law reflects the compromises necessary to resolve the tension between the Eleventh and Fourteenth Amendments.

Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees*, § 6.3 (1986). *See also Dellmuth v. Muth*, 491 U.S. 223, 227 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-239 (1985).

Although petitioner does not acknowledge it, if accepted, his argument that the Fourteenth Amendment, in and of itself, overrides the Eleventh, would require the Court to abandon this carefully developed jurisprudence. Indeed, throughout his brief, petitioner seeks to reargue the premises which underlie this line of cases. Pet. Br. pp. 23, 37-38. The Court of Appeals correctly refused to engage in this exercise. Instead, it reached the result compelled by this Court's decisions, i.e., that the Eleventh Amendment bars the relief petitioner seeks.

The decision below is plainly correct because petitioner failed to establish that either exception to the Eleventh

Amendment applies. Thus, petitioner argues that "a clear reading," Pet. Br. p. 21, of the "plain language" of Section 1 of the Fourteenth Amendment, leads to the "undeniable conclusion," Pet. Br. p. 29, that Congress intended to abrogate the Eleventh Amendment. As the court below recognized, however, although the prohibitions of Section 1 apply expressly to the States, the conclusion urged by petitioner does not follow from the general language of the provision. In contrast to Congressional enactments which have been found to express the requisite intent, it is not "unmistakably clear in the language" of the Section itself that abrogation was intended. *Atascadero*, 473 U.S. at 242; *Dellmuth v. Muth*, 491 U.S. at 228. *See also Hilton v. South Carolina Public Railways Commission*, __ U.S. __, 60 USLW 4056, 4058 (Dec. 16, 1991), reaffirming the applicability of the clear statement rule where, as here, a constitutional provision is implicated. There is, in fact, no language in Section 1 which exhibits such an intent on the part of Congress.[4] Given " 'the vital role of the doctrine of sovereign immunity in our federal system,' " *Atascadero*, 473 U.S. at 242 (quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 [1984]), there is no less need for "unmistakably clear" language in a self-executing constitutional provision such as Section 1, than in a statute enacted pursuant to an enabling provision like Section 5 of the Fourteenth Amendment.

Petitioner, citing this Court's recent decision in *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991), disputes the logic of applying the "unmistakably clear" language rule to a provision enacted prior to adoption of this rule. Pet. Br. p. 27. However, as the dissent points out in *Blatchford*, the Court did apply the rule in that case. 111 S. Ct. at 2587. Similarly, in *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 458 (1987), the Court applied the rule to the Jones Act, 46 U.S.C. § 688(a), a statute originally enacted in 1915 and amended in 1921 to read as

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4 Petitioner concedes as much by relying elsewhere on the *absence* of any language which limits the reach of the Amendment. Pet. Br. p. 26.

it does today. The Court found lacking in this early twentieth century statute the requisite clear expression by Congress of its intention to override the Eleventh Amendment. *See also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) in which the Court, in holding that the State could not be sued under 42 U.S.C. § 1983, relied, in part, on the absence of any "clear statement" in section 1983 of a contrary intent on the part of Congress. Section 1983 was enacted in 1871.

Moreover, even if the clear statement rule is inapplicable, as petitioner suggests, he is in no better position because he has failed to point to any evidence supporting his thesis that the 39th Congress intended to permit a plaintiff to recover damages from a State for a Fourteenth Amendment violation. Instead, it appears that the framers never considered the possibility of such an award. John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1454, 1458-59 (1975) ("There are no extant materials from the drafting or debate of the fourteenth amendment which indicate that the framers of that amendment ever considered whether it would be possible for a private citizen to sue a state government for damages in a federal court because the state had violated the principles of the amendment.") This Court recognized as much in *Quern v. Jordan*, 440 U.S. 332, 343, 345 (1979) insofar as it held, *inter alia*, that nothing in the "circumstances surrounding the adoption of the Fourteenth Amendment" indicated that 42 U.S.C. § 1983 was intended to abrogate the Eleventh Amendment. Accordingly, petitioner's analysis fails regardless of whether the clear statement rule applies.

Petitioner's assertion that the States waived their immunity to suits for damages when they ratified the Fourteenth Amendment is similarly unsupported. This Court has emphasized that a waiver will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reason-

able construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 [1909]). The test for finding a voluntary waiver is a "stringent one." *Atascadero*, 473 U.S. at 241.

Petitioner has not met this test. He points to no "express language" or "overwhelming" textual implications, but relies instead, as he did below, on the bare assumption that by agreeing to adoption of the substantive provisions of Section 1 of the Fourteenth Amendment, the States also agreed to waive their immunity from actions for damages. The court below correctly refused to credit this undocumented assumption.

2. Petitioner's Analysis Is Inconsistent With This Court's Decisions In Fitzpatrick v. Bitzer, Quern v. Jordan, and Will v. Michigan Dept. of State Police

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court stated that "Congress may, in determining what is 'appropriate legislation' [under Section 5 of the Fourteenth Amendment] provide for private suits against States or State officials *which are constitutionally impermissible in other contexts*." 427 U.S. at 456 (emphasis added). If Section 1 of the Fourteenth Amendment, without more, abrogated the Eleventh Amendment, as petitioner contends, a suit against the State in the absence of Section 5 legislation would not be "constitutionally impermissible." *See Jagnandan v. Giles*, 538 F.2d 1166, 1185 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977). *Fitzpatrick* thus makes clear that Section 1 does not itself override the Eleventh Amendment.

Shortly thereafter, in *Quern v. Jordan*, 440 U.S. 332 (1979), the Court explicitly held that section 1983 did not abrogate the Eleventh Amendment. Although the Court recognized that the Act ceded to the federal government many powers previously held by the States, as noted, *supra*, at page 9, it held that "neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of [§ 1983] compels, or even warrants, a leap

from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States." 440 U.S. at 342. The Court elaborated:

> Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42nd Congress believed that [§ 1983] overrode that immunity, surely there would have been lengthy debate on this point. . . . [S]ilence on the matter is itself a significant indication of the legislative intent. . . .

Id. at 343. The inference to be drawn from these statements, as the court below determined, is not simply that section 1983 did not override the Eleventh Amendment, but also, that the States' "traditional sovereign immunity," as embodied by the Eleventh Amendment, was intact when the 42nd Congress enacted section 1983 three years after the ratification of the Fourteenth Amendment in 1868.[5]

This inference is reaffirmed by the Court's analysis in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). In holding that a State is not a "person" under section 1983, the Court based its conclusion, *inter alia*, on the fact that "Congress, in passing § 1983, had no intention to disturb the State's Eleventh Amendment immunity and so to alter the federal-state balance in that respect. . . ." 491 U.S. at 66. That much, it noted, "was made clear in our decision in *Quern*." *Id.* If the Fourteenth Amendment had itself overridden the Eleventh Amendment, there would, of course, have been no immunity to "disturb" when Congress enacted section 1983. Moreover, because section 1983 was intended to enforce the Fourteenth Amendment, *Mitchum v. Foster*, 407 U.S. 224, 249 (1972), there can be no question that the "Eleventh Amendment immunity" referred to in *Will* was the States' immunity from monetary liability for alleged violations under the Fourteenth Amendment.

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5 Indeed, in *Ex parte Young*, 209 U.S. 123, 150 (1908), the Court expressly assumed that the Eleventh Amendment retained its scope and effect.

Notably, petitioner fails to address the fact that acceptance of his argument would render irrelevant most, if not all of the decisions which have elaborated the relationship between the Eleventh and Fourteenth Amendments. Instead, he presents his thesis in a vacuum, without regard to consequences and, more importantly, without any firm basis in fact or law. The court below, in applying the decisions of this Court, correctly refused to credit petitioner's rhetoric. This Court should refuse to do so, as well.

3. The Decision Below Does Not Conflict With The Decisions Of Other Courts Of Appeals

The decision below is in accord with the decisions of other circuit courts which have considered the issue of whether the Fourteenth Amendment limits the States' sovereign immunity under the Eleventh Amendment, and petitioner does not claim otherwise. *See Vakas v. Rodriguez*, 728 F.2d 1293 (10th Cir. 1984); *Jagnandan v. Giles*, 538 F.2d 1166, 1185 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977) ("The very fact that the *Fitzpatrick* Court relied on legislation, authorized by the enabling section of the Fourteenth Amendment, supports the necessity of such legislation for recovery of money from the state by a person whose Fourteenth Amendment rights have been violated."); *Townsend v. Edelman*, 518 F.2d 116 (7th Cir. 1975). Similarly, except for the district court in this case, the district courts which have considered the issue have refused to find that the Eleventh Amendment is overridden by the Fourteenth. *See e.g. United States v. DCS Development Corp.*, 590 F. Supp. 1117 (W.D.N.Y. 1984); *Henry v. Texas Tech University*, 466 F. Supp. 141 (N.D. Texas 1979); *Holladay v. Roberts*, 425 F. Supp. 61 (D.C. Miss. 1977). Accordingly, there is no conflict which requires resolution by this Court.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
January 9, 1992

Respectfully submitted,

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